

Program G

What Settlement Judges Want Lawyers to Know and What Lawyers Want Settlement Judges to Know¹

Program Overview

This program consists of three parts:

1. A lively panel discussion among lawyers, clients and judges from within the district *or* a humorous skit comprised of a series of live or videotaped vignettes involving the panelists that captures the participants' attention and raises 5-10 issues (see Small Group Discussions, below);
2. Small group discussions among 6-8 participants, guided by a discussion leader; and
3. Reports from the discussion groups followed by a brief large group discussion.

Program Objectives

1. For lawyers, clients and judges to exchange ideas and advice about settlement conferences in order to enhance the quality of practice within the district
2. To explore from the settlement judges' perspective what constitutes effective lawyer representation at settlement conferences, including the following:
 - Common errors lawyers make while representing clients in settlement conferences
 - How to prepare the judge effectively
 - The role of the client
 - Approaches to negotiating that lead to better outcomes
 - How open to be with the judge concerning information about the client's negotiating position
 - Other issues that the panelists believe relevant and useful to educating lawyers about what judges need
3. To explore from lawyers' and clients' perspectives what constitutes an effective settlement conference, including the following:

¹ At the outset, it is important for program organizers (and panelists and participants) to define "settlement conference" and distinguish it from "mediation" by drawing a clear distinction between the two. As used in this program (and more generally in this Program Guide) a settlement conference is a proceeding conducted informally by a judge in the context of a litigated case, in which the primary goal is settlement of the case. The judge takes an active role to guide parties to resolution. The judge typically focuses on the law and lawyers, rather than parties, and provides an assessment of the settlement value of the case and the likely outcome if the case goes forward. See Appendix B for additional information about settlement conferences.

- Common errors judges make while hosting settlement conferences
- Access to settlement conferences
- Timing of the settlement conference
- The influence, positive or negative, of a judge's personal qualities and judicial temperament on the settlement conference process and outcome
- Tools, techniques and approaches that maximize the prospects for reaching settlement

Time for the Program

Activity	Time
Introductory comments	8 minutes
Conversation among panelists or dramatization/skit	20 minutes
Small group discussions	35 minutes
Small group reports	15 minutes
Questions and responses	10 minutes
Concluding remarks	2 minutes
Total time	90 minutes

Program Presenters

1. **Moderator:** The moderator should be closely connected with the district's ADR program and understand the relevant issues and how settlement conferences fit into the district's ADR program.
2. **Panelists/Actors:** Lawyers, clients and judges from within the district – who have extensive experience with settlement conferences and can speak honestly and directly about the issues in a constructive way – will serve as panelists and/or as actors in the skit. Ideally, the panelists should be open to rethinking their approaches to ADR, effective in stimulating active audience participation and clear in responding to the audience's suggestions and views. The panelists may also serve as discussion leaders (see "Discussion Leaders," the following section). The panelists and/or actors should include 6 to 7 individuals from the following categories:
 - Plaintiff's attorney
 - Defense attorney
 - "Representative" clients – an individual person who has participated in settlement conference (e.g., a plaintiff in employment litigation) and a representative of a corporate or government entity who has participated on the defense side, perhaps in multiple settlement conferences
 - District judge, magistrate judge and/or bankruptcy judge

Program organizers should instruct the panelists that the panelists should engage in conversation with the audience and one another, rather than making formal presentations, and that they should raise challenging issues in their conversation in order to provide a model for the small group discussions that will follow. Program

organizers should provide panelists with citations to the reading materials and the written materials that are part of this program module to facilitate their preparation.

3. **Discussion Leaders:** In the small group discussions, each table should have a discussion leader, who begins the conversation, guides it and, if necessary, encourages it by raising issues. Discussion leaders can be the same judges and lawyers who participated in the panel discussion. In larger districts, program organizers may need to recruit additional lawyers and judges to be discussion leaders to ensure there is a leader at each table.

Room Set-up and Seating: The panelists and moderator should sit on a dais or stage in order to be visible to participants. Participants should sit at round tables that seat 6-8. To work most effectively, table seating must be organized to ensure the sufficiently diverse representation of lawyers, clients (if possible) and judges to create interesting discussion. Ideally, a table of 6-8 should seat a district judge, a magistrate judge and/or a bankruptcy judge, a defense lawyer or a plaintiff's lawyer and two clients. Organizers can pre-assign table seating and instruct participants where to sit as part of the registration check-in process.

Instructions for the Program

1. **Opening Presentation (8 minutes):** The moderator welcomes the participants and introduces the panelists and the topic by presenting an overview of the program objectives and agenda.
2. **Conversation among the Panelists *or* Dramatization/Skit (20 minutes)**

Conversation among panelists: Panelists engage in conversation, rather than addressing the issues in formal presentations. The moderator prompts the panelists' conversation by asking questions along these lines:

- Judges, what advice do you have for lawyers that, if followed, could improve the outcome and quality of the experience of parties in settlement conferences?
- Lawyers, what advice do you have for judges?
- Clients, what advice do you have for both judges and lawyers?

The moderator directs questions in a way that ensures equal participation of all the panelists and does not allow any panelist to dominate the conversation.

Dramatization or skit: A dramatization of a settlement conference that highlights and exaggerates bad practices is guaranteed to liven up the program. It could be a carefully crafted skit of a single settlement conference or a series of vignettes, followed by brief comments from the panelist "actors" about both the bad practices and the behavior that would have been more effective.

A second option is to allocate time for the actors to portray both good and bad practices. Following the skit, the actor panelists could comment, or a moderator could invite questions from the audience and the moderator and the actors could respond.

In either case, the program organizers must provide structure to the skit by identifying the subject practices and scripting the skit or providing instructions so the “actors” can script it. Included in the written materials at the end of this program module are two documents that will be useful in planning the dramatization: “Some Misguided Lawyer Behaviors” and “Some Misguided Judge Behaviors.” The dramatization/skit requires at least one rehearsal to confirm that sufficient content can be conveyed in the limited time allocated for the program. The dramatization/skit might also be videotaped, edited and shown to the participants, as an alternative to ensure quality and multiple use of the skit.

3. **Small Group Discussions (35 minutes):** The purpose of the small groups is to increase audience participation by structuring a small group exploration of ways judges and lawyers can improve the likelihood that parties will resolve their disputes at a settlement conference.

Set-up (5 minutes): The moderator explains that the small group discussions are an opportunity for the participants to explore how judges and lawyers can improve their understanding of how better to serve clients in settlement conferences. The moderator also urges the participants to add to, rather than repeat, what was said in the panel presentation.

The moderator instructs the discussion leaders, if not already seated at the round tables, to join their groups and asks the participants to think about the following questions:

- If you are a judge: What advice would you give lawyers who appear before you in settlement conferences?
 - If you are a lawyer: What advice would you give judges who conduct settlement conferences?
 - If you are neither a judge nor a lawyer: What advice would you give lawyers in helping their clients understand the settlement conference? Or, what advice would you give lawyers and judges in maintaining client satisfaction with the judicial process as a high objective during the settlement conference?
4. **Discussions (30 minutes):** The discussion leader at each table appoints a scribe to take notes and report back to the large group the small group’s advice. The participants should divide time equally between discussions about lawyers and judges, making certain to discuss clients’ perspective, even if a client is not a participant. Judges can use this opportunity to give advice to lawyers. Lawyers and

clients can give advice to judges based on their own experience, as well as concepts they have learned from others. Court staff can offer insights from anecdotal complaints or stories. If the discussion lags, discussion leaders can prompt conversation by raising the following issues:

Judges

- How to make the most of the mediator/settlement judge
- Effective settlement conference statements
- Effective use of the client
- What judges expect from lawyers regarding settlement negotiations at the settlement conference
- How and under what circumstances to use motion practice to position a case for productive settlement discussions (i.e., using motions to create the most promising context for settlement negotiations)
- How during a settlement conference to use either existing rulings on motions in the case or the prospect of filing motions which address specifically identified issues to advance the negotiation ball
- Preparing your settlement conference and negotiation strategy and making certain that your client understands and has agreed to your proposed approach
- Dealing with the aggressive “arm twisting” judge, who makes explicit or implicit threats regarding the trial to obtain a settlement

Lawyers

- How pre-settlement conference communications between the judge and the lawyers (and perhaps the parties) might improve the prospects of settlement by assuring that the parties and the judge are optimally prepared for the conference
- How to help lawyers see the other side’s perspective on the case in a way that enhances settlement opportunities
- What rulings lawyers need on motions in order to enhance the prospects for settlement
- How to help lawyers talk with their clients about settlement

Both

- Tools each group wished the others employed
- What works and why
- Do’s and don’ts
- Maintaining client satisfaction with the judicial process and promoting respect for the judicial institutions as high priorities during the settlement conference

5. **Small Group Reports (15 minutes):** If the panelists/actors have served as discussion leaders, they return to the dais. The moderator leads the reports by calling on the scribes for each group. Scribes stand at their tables and read their respective lists of advice for lawyers and for judges. If there are only a few tables, the moderator may choose to write the suggestions on a whiteboard or an easel pad. For programs with more than four tables, the moderator may ask the scribes to submit their lists, so that

the program organizers will have the option of collecting the information for future use.

6. **Questions and Responses (10 minutes):** The moderator invites the participants to ask any final questions and directs them to the most appropriate panelists.
7. **Concluding Remarks (2 minutes):** The moderator thanks the panelists/actors, discussion leaders, and participants, and concludes with a succinct statement of what he/she believes to have been the value of the program.

Written Materials

1. Instructions for Discussion Leaders
2. Possible Misguided Judge Behaviors
3. Possible Misguided Lawyer Behaviors

Possible Follow-up: To make the most of this program, the moderator could request that the scribes hand in their respective lists. A volunteer could assemble the lists and the suggestions from the panelists and create a composite list of suggestions for distribution to district conference participants, and/or a volunteer could write a newsletter or local bar magazine article summarizing the suggestions. Either of these approaches would increase the likelihood that program participants retain and apply what they learn. Alternatively, a volunteer could turn the suggestions into a document to be sent to all judges and to lawyers along with the notice setting a settlement conference, and/or the information could be posted on the court's website.

Resources

Articles

1. Brazil, Wayne D. "A Judge's Perspective on Lawyering and ADR," 19 *Alternatives* 4 (January 2001).
2. Brazil, Wayne D. *Effective Approaches to Settlement: A Handbook for Lawyers and Judges*. (Clifton, N.J.: Prentice Hall, 1988).
3. Brazil, Wayne D., "Effective Lawyering in Judicially Hosted Settlement Conferences," 1988 *Journal of Dispute Resolution* 1 (1987).
4. Brazil, Wayne, D. "For Judges: Suggestions about What to Say About ADR at Case Management Conferences--and How to Respond to Concerns or Objections Raised by Counsel," 16 *Ohio St. J. on Disp. Resol.* 165 (2000).
5. Brazil, Wayne D. "Hosting Settlement Conferences: Effectiveness in the Judicial Role," 3 *Ohio State J. Dispute Resolution* 1 (1987).
6. Brazil, Wayne D. "Negotiating in the Shadow of a Settlement Judge: Some Misguided Behaviors by Lawyer-Negotiators," forthcoming in *The Negotiator's Fieldbook*, Eds. Christopher Honeyman and Andrea Schneider. Washington, D.C.: American Bar Association Books, late 2005.

7. Brazil, Wayne D. “What Lawyers Want from Judges in the Settlement Arena,” 106 F.R.D. 85 (1985).
8. Gochros, Susan Pang. “Settlement Conferences: The Good, the Bad, and, the Ugly,” Hawaii Bar Journal, November 2003.
9. Trial Courts of Arizona Maricopa County, *Civil Settlement Conference Training Manual*. December 2004. (An electronic copy is available at <http://www.superiorcourt.maricopa.gov/adr/>. Click on Judges Pro Tempore link.)

Cross-reference: Please refer to the program module ADR: A Dialogue between Judges and Lawyers for additional ideas or resources related to this program.

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Instructions for Discussion Leaders

- 1. Appoint a scribe** to take notes and report back to the large group the small group's advice.
- 2. Divide time** equally between discussions about lawyers and judges.
- 3. Make certain to discuss the clients' perspective**, even if a client is not a member of the group.
- 4. Get the discussion going:**
 - a. Judges use this opportunity to give advice to lawyers. Lawyers and clients give advice to judges from their experience, as well as concepts they have learned from others. Court staff can offer insights from anecdotal complaints or stories.
 - b. Use the written materials, which are included at the end of this module, to prompt the discussion: "Possible Misguided Lawyer Behaviors" and "Possible Misguided Judge Behaviors".
 - c. If the discussion lags, discussion leaders can prompt conversation by raising the following issues:

Judges

- How to make the most of the mediator/settlement judge
- Effective settlement conference statements
- Effective use of the client
- What judges expect from lawyers regarding settlement negotiations at the settlement conference
- How and under what circumstances to use motion practice to position a case for productive settlement discussions (i.e., using motions to create the most promising context for settlement negotiations)
- How to use either existing rulings on motions or the prospect of filing motions that address specifically identified issues to advance the negotiation ball during a settlement conference
- Preparing your settlement conference and negotiation strategy and making certain that your client understands and has agreed to your proposed approach
- Dealing with the aggressive "arm twisting" judge, who makes explicit or implicit threats regarding the trial to obtain a settlement

Lawyers

- How pre-settlement conference discussions with the other counsel and/or with the judge about how to prepare for the settlement conference can enhance the prospects for settlement
- How to help lawyers see the other side's perspective on the case in a way that enhances settlement opportunities
- What rulings lawyers need on motions in order enhance the prospects for settlement
- How to help lawyers talk with their clients about settlement

Clients

- Identify various judge and lawyer behaviors in preparing for, or presiding over, settlement conferences and discuss the effects (positive or negative) these behaviors have on the course and vitality of negotiations, on the prospects for achieving settlement, and on the client's feelings towards or opinions about the judiciary and our system of justice.
- Consult the written materials, which are included at the end of this module, of possible judge and lawyer behaviors.

Lawyers, clients and judges

- Tools each group wished the others had/used
- What works and why?
- Do's and don'ts

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Possible Misguided Lawyer Behaviors

1. Inadequately researching the law
2. Failing to be fully conversant with the facts relevant to settlement
3. Neglecting to prepare the client for participation in the settlement conference
4. Failing to prepare the client adequately for the role your settlement judge will expect your client to play. There are various roles clients can effectively play in the settlement conference, and the client's role can vary judge-to-judge, client-to-client and case-to-case. It is a mistake to assume all settlement conference judges treat clients the same or expect clients to play the same role. Lawyers should:
 - Be prepared for different roles and formats
 - Prepare the client to be flexible
 - Find out what your judge is like, or what the patterns in this court are, and then prepare your client so that he/she can participate effectively.
5. Forgetting to consider and discuss creative options with the client in preparation for the settlement conference
6. Neglecting to plan adequately for the money negotiation by creating a negotiation strategy and getting your client's agreement to that strategy
7. Failing to bring the client, or failing to bring the client representative with adequate authority to settle the case
8. When it is impossible to bring a client with adequate authority, neglecting to inform the court and opposing counsel and neglecting to make appropriate arrangements to communicate with additional client or carrier representatives to obtain increased authority during the settlement conference, if necessary
9. Failing to be available or make sure the client is available for the time required to reach agreement
10. Perfunctory, incomplete, unnecessarily inflammatory or poorly written settlement conference statements
11. Refusing to be in the same room with the other party or lawyer
12. Opening with an offer/demand that is too close to your bottom line, and thereby not leaving room to negotiate appropriately with the opposing party
13. Opening with an obviously implausible or extreme position – undermining your credibility with the judge and the opposing party
14. Overvaluing the case or overselling it to the client
15. Giving the judge a bottom line too early in the process or refusing to give the judge a bottom line late in the process, thereby robbing you of necessary negotiation flexibility
16. Lying about the bottom line
17. Not recognizing that you can say things so you do not have to lie
18. Not recognizing that you can find ways of resisting movement without lying
19. Obvious lies are a grievous error
20. Giving ultimatums does not work and causes you to lose credibility

21. Insulting or impugning the character or ability of the other lawyer or client in joint session
22. Giving the settlement judge information that strengthens your client's case – crucial information about the strength of your client's case and weaknesses of the other side – but telling the judge to keep the information confidential from the other side
23. Giving the judge your closing argument in private session
24. Over-confidence/bravado, or otherwise projecting the impression that you think you have nothing to learn (even from the judge)
25. Analytical inflexibility – apparent closed-mindedness
26. Unwillingness to acknowledge anything positive about your opponent's case
27. Letting the settlement judge learn first from your opponent about the weaker aspects of your case (at least those that your opponent is likely to have figured out)
28. Bullying or threatening an opponent – or expecting the judge to do so
29. Appearing to be (or being) defensive and rigid
30. Appearing to be preoccupied with tactical maneuvering/gaming
31. Appearing to be almost wholly reactive (rather than grounded in the merits of your case) in the positions you take or the numbers you offer
32. Appearing to the settlement judge to elevate your interests (as counsel) over the interests of your client – or to permit your interests (e.g., in money or your politics or values or positions in other cases) to infect your judgment about what is in your client's best interests
33. Ego-blurring with your client, or identifying too emotionally with your client or his/her cause
34. Nickel and dime negotiating
35. Failure to anticipate the assumptions about your client's negotiation position the judge might make based on your statements to the judge early in the settlement conference about your client's settlement position
36. Adding, seriatim, new elements or conditions to an offer or demand that has already been the subject of substantial, or even successful, negotiations

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Possible Misguided Judge Behaviors

1. Failing to read the settlement conference statements carefully
2. Including or excluding clients, without considering the particular case fully
3. Requiring or failing to require client participation, without considering the particular case fully
4. Failing to explain to the client and counsel how you will structure or organize the conference and what roles you anticipate each participant will play
5. Failing to explain the confidentiality rules
6. Failing to identify clearly which communications and/or documents the parties or the lawyers want kept secret
7. Disclosing one party's secrets to the other party
8. Failing to explain the reasoning that supports or underlies the opinions you offer or the suggestions or proposals you make
9. Neglecting or focusing entirely on clients, rather than lawyers, or on lawyers rather than clients
10. Ignoring the human element or the experience and feelings of clients
11. Applying inappropriate pressure or failing to apply appropriate pressure to lawyers or clients in order to achieve a settlement
12. Holding or eliminating sessions in which all lawyers and clients participate, without considering the particular case fully
13. Declaring or failing to declare a settlement value for the case – in joint or separate session – without considering the timing and negotiation progress made in the conference
14. Predicting or failing to predict an outcome if the case does not settle – without considering the timing and negotiation progress made in the conference
15. Presiding over the settlement conference in a case in which the judge will also preside at trial, especially when the judge does so in a heavy handed manner resulting in counsel's likely feeling subtle (or not so subtle) pressure to settle out of concern for what the judge will do during the trial if the case does not settle
16. Scheduling insufficient time for the conference
17. Adjourning prematurely, before parties know what settlement is possible, or at least what the range of difference is between their respective positions
18. Keeping participants after they indicate there is no hope of settlement
19. Jumping too quickly to the numbers
20. Embarrassing the lawyer in presence of her/his client
21. Invading the attorney-client relationship – usurping the lawyer's role of the client's "advisor" in an inappropriate way

***What Settlement Judges Want Lawyers to Know and What Lawyers
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Feedback Form***

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: _____

Tel. no.: _____ E-mail address: _____

Location of the program: _____

1. How did you use the module? If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

2. How can we improve the module?

3. How can we improve the Program Guide?

4. If a skit was part of your program, please evaluate its effectiveness in raising issues constructively and engaging participants?

5. Are there additional examples of misguided settlement conference behaviors by judges or lawyers that we might include in this module?

6. Please suggest topics for future ADR program module.